NO. 03-16469-BB

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 9, 2004
THOMAS K. KAHN
CLERK

UNITED STATES OF AMERICA,

Appellee,

- versus -

MARTIN G. CHAMBERS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

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MARTIN CHAMBERS' OPPOSITION TO UNITED STATES' MOTION TO STRIKE NEW ISSUE RAISED IN APPELLANT'S REPLY BRIEF

The government has filed, on May 4, 2004, a motion to strike an argument by appellant regarding the applicability of *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 253 [*sic*] (2004) to this case. Appellant objects to and opposes striking this issue. This objection is based upon the following:

1. Martin Chambers filed an Opening Brief with this court in April 2004.

2. The United States Supreme Court, on June 24, 2004, decided *Blakely v. Washington*, __ U.S. ___, 124 S.Ct. 253 [*sic*] (2004). That case, as is explained in arguments contained in the Appellant's Reply Brief, renders the sentencing of appellant Martin Chambers as it occurred in this case. unconstitutional. In *Blakely*, the court applied the principles of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), to a Washington State sentencing scheme which is very similar to the United States Sentencing Guidelines. The *Blakely* decision extended the rule of *Apprendi* beyond the limits previously understood by most courts to have considered the issue, and clearly beyond its application as decided by this court.

3. The Eleventh Circuit, *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001) *specifically* held that *Apprendi* only applied to sentencing facts "that increased the penalty for a crime beyond the prescribed statutory maximum." 269 F.3d at 1268. *Sanchez* made it abundantly clear that, in the Eleventh Circuit, *Apprendi* was inapplicable so long as the ultimate sentence imposed upon a defendant was at or below the statutory maximum. Under *Sanchez*, there is *no question* that *Apprendi* could not be applied to this case.

4. *Blakely* clearly established a new rule of constitutional law which is *required* by the Supreme Court to be applied to "cases pending on direct review". See *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987); *United States v. Sanchez*, *supra*, 269 F.3d at 1268, n.35.

5. On or about July 2, 2004, Chambers sought leave of court to file a supplemental Opening Brief to discuss the applicability of *Blakely* to this case. The government opposed that request. To date, no ruling has been made upon it.

6. The government in its present motion relies on a series of cases in this Circuit which, it says, precludes consideration of any issue not raised in the opening brief. *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000).

7. The application of this rule to the present appeal is unconstitutional, and violates Chambers' rights in the following regards:

a. Chambers would be denied his Sixth Amendment right to a jury trial, as required by *Blakely*, with regard to those facts, relied upon by the district court, in enhancing his sentence, as is explained in the Appellant's Reply Brief;

b. Chambers would be denied equal protection of the law, because, unlike an appellant identically situated to him, whose opening brief was scheduled to be filed following the *Blakely* decision, he would be deprived of the substantial benefits of *Blakely*, simply because his brief was filed earlier than the *Blakely* decision;

c. Chambers would be denied due process of law because this court has previously determined that *Apprendi* did not apply in the manner described in *Blakely*, and, to raise this issue, Chambers would have had to have raised an issue considered frivolous in this court.

d. Failure to apply *Blakely* would deny Chambers due process because to do so would conflict with previous statements of this court.[1] *Sanchez*, which explained the limits of the *Apprendi* decision in this Circuit, recognized, at footnote 35, the retroactive application of new constitutional principles, even when not previously raised;

e. Chambers would be denied due process because the court, in applying a notion of "waiver" under these circumstances would deprive Chambers of a valuable constitutional right, despite the fact that there has been no "waiver", no voluntary relinquishment of a "known right". In fact, in this Circuit, *Apprendi* was not a "known right" but was known to not be a right.

8. This court, apparently standing alone [see *United States v. Ardley*, 273 F.3d 991, 996 (Tjopflat, Circuit Judge, dissenting from the denial of a petition for rehearing *en banc*)] deprives criminal defendants on appeal of the mandatory retroactive application of recent Supreme Court constitutional decision, based on a theory of "abandonment". The application of the abandonment principle not only does an injustice to the retroactivity requirements of *Griffith*, but is particularly abhorrent in a situation such as this, in which this court has specifically indicated, in *Sanchez*, that the issue that it now seemingly requires to have been raised was without merit.

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[1] See *United States v. Diaz*, 248 F.3d 1065, 1104 (11th Cir. 2001); *United States v. Thomas*, 242 F.3 1028, 1034 (11th Cir. 2001); *United States v. Audain*, 254 F.3d 1286, 1288-89 (11th Cir. 2001); *United States v. Gerrow*, 232 F.3d 831, 833 (11th Cir. 2001); *United States v. Walker*, 228 F.3d 1276, 1278 n.1 (11th Cir. 2000); *United States v. Candelario*, 240 F.3d 1300, 1311 (11th Cir. 2001). But see *United States v. Levy*, __ F.3d __, No. 01-17133 (11th Cir. August 3, 2004) (on Petition for Rehearing).

9. Nor does abandonment satisfy the constitutional requirement of waiver of a constitutional right. Under *Johnson v. Zerbst*, 304 U.S. 458 (1938) such a right can *only* be waived if there is finding of a voluntary and intentional waiver of a "known right". It is inconceivable that one could conclude that the application of *Apprendi* to this case could be determined a "known right" when, under *Sanchez*, an appellant in this Circuit (and indeed in every other Circuit) was deprived of that right.

10. The application of the abandonment rule would create a conflict not only with decisions of other Circuits (see *Ardley, supra*, Tjoflat dissenting from denial of Petition for Rehearing *en banc*) but with this Circuit. See footnote 1 above.

11. As a result, the application of the "abandonment" rule would deprive Chambers of his rights to due process, equal protection of the laws, and jury trial, in violation of the Fifth and Sixth Amendments to the United States Constitution.

CONCLUSION

Martin Chambers respectfully requests that this court *grant* his previously filed motion to file a supplemental brief regarding *Blakely v. Washington*, *supra*, and *deny* the government's motion to strike the argument concerning *Blakely* from the brief previously submitted to this court.

DATED: August 6, 2004

Respectfully submitted,

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/s/ DONALD M. RÉ
DONALD M. RÉ
Attorney for Appellant
MARTIN G. CHAMBERS

(Certificate of Service and Certificate of Interested Persons have been omitted.)